No. 22492

MAY 30 1968

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From United States District Court, Central District, Pursuant to 28 U. S. C. 1291.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Jurisdictions.

Jurisdiction in the United States District Court was invoked by the United States as plaintiff and rested upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 933, 28 U.S.C. Section 1345 [Clk. Tr. p. 2]. This section reads as follows:

> "Except as otherwise provided by Act of Congress the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

Venue was laid in the Central District of California, formerly the Southern District of California, Central Division, because appellant had its principal place of business in Los Angeles and because the fire, the extinction of which is the basis of the action, occurred in the San Bernardino National Forest [Clk. Tr. p. 3].

Jurisdiction in the Court of Appeals is founded on 28 U.S.C. Section 1291, reading:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

The judgment in this case was a summary judgment [Clk. Tr. p. 186]. A summary judgment is a final judgment and is appealable as such.

> *Lamb v. Shasta Oil Co.* (5th Cir., 1945), 149 F. 2d 729.

The summary judgment was signed, filed and entered on September 29, 1967 [Clk. Tr. p. 186], and the appeal was timely taken on November 9, 1967 [Clk. Tr. p. 187], having been taken within sixty days and the United States being a party [Federal Rules of Civil Procedure, Rule 73(a)].

Statement of the Case.

The United States, appellee, sued appellant for $10,865.90, alleged to be the sum spent to suppress a fire on national forest land and for interest and costs. The action was in two "counts" or causes of action. The first rested on alleged negligent construction, operation and maintenance of appellant's electric power transmission line which had been installed on a right-of-way across the national forest granted to appellant under a so-called Special Use Permit; and the second founded solely upon the alleged fact that the fire was caused by sparks from appellant's power line and without any claim whatever of negligence [Clk. Tr. pp. 2-4].

The "Special Use Permit" was a document, contractual in form, executed by the acting Forest Supervisor on behalf of appellee and by a Vice President on behalf of appellant in 1962. (The clearest copy of the Special Use Permit is set out as Exhibit 1 to the Answer of appellant [Clk. Tr. pp. 15-20] and is printed in this brief as Appendix 1).

Appellant denied negligence and all liability under the second cause of action, denied that appellee had performed the obligations required to be performed by "the contract", assuming the Special Use Permit was a contract, and contended by affirmative defenses that appellee's contributory negligence and voluntary assumption of the risk and hazard of fire barred any recovery otherwise available to the Government [Clk. Tr. pp. 11-14].

After extensive discovery by interrogatory [Clk. Tr. pp. 22-75, 76-79, 84-89] and after some depositions [Clk. Tr. p. 170] the parties stipulated:

1. That the sole governing contract was the said Special Use Permit and that the same was the effective instrument.

2. That the claim of the United States was based *solely* upon the said Special Use Permit and that there was no claim that appellant was negligent or at fault.

3. That the sole issue was whether appellant was liable by reason of its liability without fault pursuant

to its obligations under the "aforesaid contract" (the Special Use Permit).

4. That the damage suffered by appellee proximately resulted from reasonably necessary fire suppression costs; that the fire was electrical in source, and that the source electricity was that being conducted by appellant in its lines [Clk. Tr. pp. 92-93, emphasis and parenthetical expression added].

By a second stipulation the amount of the said damages was agreed to be $8,224.00 [Clk. Tr. pp. 172-173].

By a series of documents anticipatory of pretrial and filed in conventional manner, the parties extensively stated, pursuant to the foregoing stipulations, the issues to be tried, the contentions of law, the exhibits to be offered, the names of the witnesses to be called, the facts to be proved [Clk. Tr. pp. 141-155, 161-162]. By a joint proposed pretrial conference order, approved both in form and substance by all parties and lodged with the court, the parties agreed that certain facts were admitted, which were specified in detail, and that certain facts were to be contested by evidence (essentially the facts pertaining to the meaning of the contract and to its asserted unconstitutionality). By the said order [Clk. Tr. pp. 164-171] appellee listed fourteen documents, including letters, certificates, a manual and a handbook which it proposed to offer in evidence. Appellant, in said proposed order [Clk. Tr. p. 169] enumerated certain exhibits which it would use under certain circumstances. Appellee proposed to call two witnesses and appellant indicated, depending upon the determination of certain rulings, that it might call as many as three witnesses. Further discovery was reserved under certain circumstances, and interrogatories and the answers thereto were agreed to be admissible when relevant [Clk. Tr. pp. 169-171].

Pending the anticipated pretrial, appellee filed its Motion for Summary Judgment, contending in substance that appellant was liable to it without fault and even though appellant had been stipulated not to be negligent or at fault in any way and by reason of the contract (said Special Use Permit, Appendix 1) and particularly by reason of the language therein, reading:

> "8. The permittee shall pay the United States for any damage resulting from this use."

The contention was made that the governing law permitted the Department of Agriculture, acting through the National Forest Service, to impose liability without fault upon appellant by contract, that it had intended to do so and had done so by the contract in the instant case; that there was good reason for such imposition in that the transmission of electricity was a special hazard of fire in the forests; that the word "damage" as used in the contract included fire suppression costs; and that the contract was clear as a matter of law [Clk. Tr. pp. 96-117].

Appellant resisted the Motion and filed affidavits, memoranda and contentions of fact and law in opposition thereto [Clk. Tr. pp. 118-140]. The affidavits of appellant (then defendant) were uncontroverted and included allegations directly contrary to the statements of fact, made without verified support, in appellee's Motion [Clk. Tr. pp. 94-117]. The essentials of these affidavits were:

1. That electricity and electrical transmission were, by appellee's own admissions, an insignificant factor in the causation of forest fires, constituting a minor portion thereof [Clk. Tr. p. 121].

2. That the unverified statement of appellee that an insignificant sum had been paid to appellee for the rights-of-way in question was untrue and specifically in that connection that the sum paid to agencies of the United States Government for rights-of-way in the national forest land of the United States for the calendar year 1962 (the year of the contract in suit) exceeded $40,000.00 [Clk. Tr. p. 118].

In the course of other proceedings before the court relevant to the decision on the Motion for Summary Judgment, appellant offered to produce, upon a full trial of the action, additional evidence which would establish the factual discrimination of which complaint is here made on constitutional grounds and there was, in substance, the admission by the Government (appellee) that other transmitters of electricity, which were publicly owned or privately owned but publicly financed, were treated more favorably than was appellant here in the very area of contention [Rep. Tr. p. 5].

The Government's contention that the private transmitter of electricity across national forest lands can be made absolutely liable for electrically-sourced fires, even in the stipulated absence of fault, is made in this case for the first time [Rep. Tr. p. 19] and this despite the existence of the language in the contract since 1916 [Rep. Tr. pp. 19-20].

The motive of the Government and the reason for its conduct in this matter is perhaps most clearly revealed in the remark of its counsel in answer to the court's question, as reported on Page 20 of the Reporter's Transcript:

> "The Court: This is the first non-negligent electrically caused fire that has arisen under such a contract, even though it is over fifty years old?"
>
> Mr. Coleman [the Assistant United States Attorney]: So far as I know. I don't know of any other such cases.
>
> I will say this, that probably in the great majority of the cases negligence can be found. I would say that perhaps the fire which occurred in this case wasn't particularly a clearly negligently caused fire. Of course, that is now out of the case since a stipulation has been entered into by the parties."

Appellant's contentions were and remain:

1. That the contract cannot properly be interpreted to impose liability without fault, and in this connection every intendment of interpretation favors a reading which does not so impose absolute liability.

2. That if the contract is interpreted to impose liability without fault, such an interpretation, and the enforcement thereof by action, is unconstitutional in that it discriminates against appellant when a similar obligation is not imposed upon other public utilities similarly situated. This contention rests upon the equal protection content of the Fifth Amendment to the Constitution of the United States. The discrimination is extreme and unreasonable in that there is no factual basis of distinction upon which the Government could reasonably impose a heavier burden upon appellant than upon other like electrical transmitters.

After the Motion for Summary Judgment ruled upon by the Honorable District Court, appellant sought changes in the findings and additional findings consistent with the uncontradicted contentions and affidavits of appellant [Clk. Tr. pp. 175-178]. These the Court, by inaction, declined to make.

Specification of Errors.

I.

Under the contract (Special Use Permit), the Appellant is liable for the cost of suppressing fires resulting from its use of the national forest whether or not said fires are the result of its negligence or other fault [Clk. Tr. p. 182].

II.

An interpretation of the said contract to impose liability without fault is not unconstitutional in that it discriminates against appellant, a privately owned utility, when a similar obligation is not imposed upon other public utilities similarly situated [Clk. Tr. pp. 181, 183-184].

I.

Absolute Liability Cannot, as a Matter of Law, Be Imposed Upon Appellant Under the Terms of the Contract and the Contradicted Facts.

A. Preliminary Statement.

Under the pleadings and stipulations, the sole issue to be tried by the court was whether under the terms the pertinent contract [Special Use Permit, Clk. Tr. pp. 6-10, 15-19, reproduced more legibly in Appendix 1], including all contractual defenses properly raised, appellant was absolutely liable to appellee for the cost of extinguishing the fire which resulted, *without negligence or any fault,* from appellant's electrical lines [Clk. Tr. pp. 92-93]. In connection with the presentation of this issue, stipulations and the Government's answers to interrogatories had established beyond contradiction that:

1. The contract, as set forth in the appendix, was accurate in form, duly executed and the only pertinent contract [Clk. Tr. pp. 92-93].

2. The appellee owned the land where the fire occurred [Clk. Tr. p. 92].

3. The fire was electrical in source and the source electricity was that conducted by appellant in its circuit maintained under the said contract [Clk. Tr. p. 93].

4. At no time did any Forest Service official or anyone acting for appellee object, in any way, to the manner of the layout, construction, reconstruction, alteration or maintenance of the electrical circuit, aforesaid, which was the source of the electricity which caused the fire [Clk. Tr. p. 40, interrogatory 15 and answer thereto].

5. At no time did any Forest Service official or anyone acting for appellee object, in any way, to the manner of construction, maintenance or operation of the line, nor object, in any way, to the failure to perform any of the safety precautions provided in the permit [Clk. Tr. pp. 40-41, interrogatory 16 and answer thereto].

6. The appellee never contended that appellant did not have a fire prevention and control plan adequate, in the judgment of the Forest Service, to the risks and hazards of the use in the national forest of the said

electric circuit [Clk. Tr. p. 41, interrogatory 18 and answer thereto].

It is also patent, from an inspection of the verbatim copy of the contract, that it was a contract drafted by appellee and set out on a regular Government printing office form [see Appendix 1].

As is above stated, the answer of appellant had challenged the existence of negligence and had pleaded contributory negligence; but these issues became removed from the case by reason of subsequent stipulation. On the issue of the contract, appellant, however, continued to contend that there was no absolute liability thereunder and relied as well upon the failure of the appellee to perform the obligations imposed upon it by contract. This defense [Clk. Tr. p. 13], of course, was relevant to the action on breach of contract, which turned out to be the only action presented to the court.

The affidavits presented further established, without contradiction, that electricity was not a substantial cause of forest fires, contrary to the unsupported position of appellee that electrical transmission was a so-called "high hazard" to the national forests [Clk. Tr. pp. 120-127].

In this factual atmosphere, therefore, appellant argues as follows.

The concept of absolute liability, an unusual concept in law, means, in perhaps the more common language of lawyers, liability without fault. It is the view of the United States here that so long as the fire was electrical in source and the source was appellant's line [both of which facts are stipulated], appellant is liable to appellee for the cost of extinguishing the fire, regardless of fault and despite the admitted lack of negligence or fault of any kind. Although, in the court's opinion and in parrying an argument of counsel, the trial court said that we were not faced in this case with a situation where there was what might be deemed an efficient intervening cause, it is, we respectfully argue, manifest that if there is absolute liability without fault, such normally insulating factors pertinent to the law of negligence are totally irrelevant.

In short, if this contract means what the Government says it means, it is an absolute promise to pay and there are no defenses whatever. We submit this is not what the contract says and if it can be properly interpreted so to say, then the imposition of the contract and its enforcement impose an unconstitutional burden upon appellant in light of the dissimilar contractual obligations imposed by the Government upon persons similary situated. The first question, therefore, is whether the contract, by its terms, imposes such a severe liability. In determining whether such is the case, the contract must be read in light of universally accepted canons of interpretation and the general understanding of the law pertaining to absolute liability.

B. Absolute Liability Is an Exceptional Situation and Should Rarely Be Determined to Exist and Then Only in the Clearest Case.

The basic foundation of legal liability at the common law is wrong or fault. This is true whether the formal font is in the rules of law, that is, based on tort; or in the agreement of the parties, that is, based on contract. In either case the fundamental philosophical concept is that the party who is to be penalized in damages must have done wrong, by either failing to perform his promise or disobeying the rules of convenience and safety which the community has found it necessary to apply.

> Holmes, *The Common Law,* 1881, 144-163;
>
> Salmond, *Law of Torts,* 7th Ed. 1924, 11-12;
>
> Smith, *Tort and Absolute Liability,* 1917, 30, Harv. L. Rev. 241, 319, 409.

This doctrine has found frequent expression in the cases, not the least important of which are those particularly pertinent to this District and Circuit. In *Grace & Co. v. City of Los Angeles* (S.D. Cal. 1958), 168 F. Supp. 344, a water pipe owned by the city burst, allowing a quantity of water to escape and damage plaintiff's coffee. Plaintiff, relying on *Rylands v. Fletcher* (1868), L.R. 3, H.L. 330, contended, in addition to claiming negligence, that defendant was liable without fault or on absolute liability [168 Fed. Supp. at 346]. In denying that the case was one for the imposition of absolute liability, the District Court, quoting the California Supreme Court in *Green v. General Petroleum Corp.* (1928), 205 Cal. 328; 270 Pac. 952, 60 A.L.R. 475 said:

> ". . . [We are led] to the conclusion that the rule that injury may exist without liability is, as has been so well stated by another court, 'contrary to the general rule of liability where injury is caused; and since, in a sense, it is a preference of the rights of one property owner or user over that of another; and since the law is a jealous guardian of the right to lawfully use property without reference or diminution; and since the rule of "sic utere tuo ut alienum non laedas" is of broad and

> fundamental importance—the rule which allows such injury without liability therefor is an exception which is and should be narrowly limited and carefully confined.' " [168 F. Supp. at 347].

This definitive approach was affirmed *sub silentio* in this Honorable Court [278 F. 2d 771].

The rule that the concept of absolute liability should have a limited application has been expressly applied to the transmission of electricity.

> *McKenzie v. Pacific Gas & Elec. Co.* (1962), 200 Cal. App. 2d 731, 736, 19 Cal. Rptr. 628, where earlier cases are collected.

While the California electricity cases are usually tort cases, the conceptual approach is equally applicable in contract wherever a question of interpretation is open.

We think, then, it is demonstrated that a contract should not be lightly interpreted to impose liability without fault and that every intendment is against such interpretation.

C. Any Ambiguities Caused by the Draftsman of a Contract Must Be Resolved Against That Party.

It goes almost without saying that an instrument drafted by a party is to be interpreted in case of doubt in favor of the opposite party. [*Narver v. California State Life Ins. Co.* (1930), 211 Cal. 176, 180-181, 294 Pac. 393, 71 A.L.R. 1374; *Logomarsino v. San Jose, etc. Title Ins. Co.* (1960), 178 Cal. App. 2d 455, 464, 3 Cal. Rptr. 80]. Since the Government admittedly drafted this instrument, any conflict of interpretation is to be resolved in favor of appellant. The appellant had no choice of language here. Its option was simply to accept the contract as drafted or not use the national forest at all.

Act of February 15, 1901; 16 U.S.C. 522.

For practical reasons, the none-use of the national forest was simply impossible.

D. The Contract Must Be Interpreted, If at All Possible, to Save Its Constitutionality Rather Than Reach an Unconstitutional Result.

If, of course, absolute liability would make the contract and its enforcement unconstitutional, the contract is to be interpreted as not requiring such absolute liability in order to save the constitutionality of the instrument and the program. No American constitutional doctrine is older.

Alexander Hamilton, *The Federalist,* Numbers 78 and 81 (Modern Library Edition, pp. 506, 522-533).

E. The Contract Does Not, Within Its Terms, Impose Absolute Liability.

The Government's case is based solely on Clause 8 of the contract, reading, "The permittee shall pay the United States for any damage resulting from this use." Passing the question which we urged below that this clause is a procedural one, directing payment, and is not a substantive source of an obligation to pay, it should first be noted that nowhere in the contract are the words "absolute liability" or "liability without fault" used. The law knows much damage for which there is no remedy. *Damnum absque injuria* is such a commonplace as to have become a legal maxim. In the absence of the breach of any substantive clause of the contract by appellant, it does not seem reasonable to construe this direction of payment to require payment without fault. We are not, however, left without further and controlling indications. The contract [Appendix I] imposes detailed duties upon appellant.

Under Paragraph 3, nothing can be developed, laid out, constructed, reconstructed, altered or revised except upon advance approval of the Forest Supervisor.

Under Paragraph 4, the standards of repair, orderliness, neatness, sanitation and *safety* are only those acceptable to the Forestry Department (emphasis added).

Under Paragraph 6, the permittee must comply with all the regulations and laws of governing authority. This includes the regulations of the Departments of Agriculture, all federal, state, county and municipal laws, and these laws and regulations, as the court will undoubtedly judicially notice, constitute literally hundreds of minute safety precautions. For example, General Order 95, the rules for overhead line construction pertinent to the line here in question, promulgated by the California Public Utility Commission under the authority of California law, alone comprise more than 350 pages of safety regulations [Rules for Overhead Electric Line Construction, General Order No. 5, State of California Public Utilities Commission].

Not content with these specific requirements, there are further obligations cast upon appellant by the contract.

Under Paragraph 7, the permittee shall take all *reasonable precautions* to prevent and suppress forest fires (emphasis added).

Under Paragraph 23, the permittee shall clear designated portions of the power line right-of-way and keep them clear as required by the Forest Officer in charge. This includes trimming branches, removing dead snags and trees leaning toward the line and observing other precautions against fire as may be required by the Forest Officer in charge. The clearing width shall be restricted to that necessary for *safe transmission* unless the specification permission of the Forest Supervisor for a greater clearing width is obtained (emphasis added).

Under Paragraph 23, the permittee shall do everything *reasonably within its power* both independently and upon request of the Forest Service to permit and suppress fires on or near the lands to be occupied under the permit during the period of construction (emphasis added).

Under Paragraph 26, the transmission lines shall be designed and constructed in accordance with the accepted standards and specifications of the California Public Utilities Commission by its General Order No. 95, or subsequent orders issued by that commission. The permittee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its power line and other power lines not owned by the permittee and further to reduce to reasonable degree the liability of any structure or wires falling and obstructing traffic or endangering life on highways and roads, in a manner satisfactory to the Forest Service.

Thus, beyond question, the specific detailed duty of appellant was spelled out in the contract, all with the intent that the activity be made as safe and non-hazardous as the most prudent man, in the exercise of the highest standard of care, could make it. Nowhere, however, is it stated that if these obligations are carefully discharged by appellant he is nevertheless liable for any resulting damage, though he has been free of all fault. Would it not have been easy so to say if such were the case.

May we respectfully call the court's attention to Paragraph 7 and Paragraph 8 directly compared.

Paragraph 7 states that the permittee shall take all *reasonable precautions* to prevent and suppress forest fires (emphasis added). Paragraph 8 says, if it means what the Government would have it mean, the permittee shall pay the United States for any damage [resulting from the transmission of electricity whether or not such reasonable precautions are taken and even though the fire does not result from the failure to take reasonable precautions] (bracketed material added). In the absence of any specific language imposing absolute liability, can this contract be reasonably interpreted, in two paragraphs, side by side in number, so inconsistent, to impose such a liability? If Paragraph 8 is interpreted in light of Paragraph 7, there is no absolute liability. If 8 and 7 are deemed to conflict, than 7 prevails, this because 7 is printed and 8 is typed and Paragraph 16 provides, "In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provision thereof, the preceding printed clauses will control." Paragraph 8 is typed and followed Paragraph 16 and there can, we think, be no question but that under the very words of the contract itself, as well as under the canons above enumerated, the obligation cast upon appellant is that of reasonable care, the normal obligation.

The appellant discharged all of its obligations under the contract. The lines not only have been stipulated to have been constructed, maintained and operated without fault, but the interrogatories above quoted establish that during all pertinent periods no fault whatever was found by the Forest Service with any action of appellant, although the contract cast upon it the duty, as well as the right, of correcting any failures in appellant's system or the operation thereof which would tend to be a risk or hazard of fire to the national forest (see the interrogatories above cited).

II.

An Interpretation of the Contract to Impose Liability Without Fault Results in a Denial of Appellant to the Equal Protection of the Laws and, Therefore, a Denial of Due Process of Law.

A. Preliminary Statement.

As has been said, the contract should be interpreted not to impose absolute liability if the imposition thereof would produce a constitutional flaw. It is clear that an interpretation imposing only the duty of reasonable care is consistent both with the contract, with ordinary philosophy of law and with the Constitution. The Government treats other identical electrical utilities in different fashion, providing only they are publicly-owned or financed. The Government made it clear that it did not intend to impose absolute liability on publicly-owned or financed utilities. On November 26, 1967 the Forest Service officially issued Circulars Numbers U161 and U202, pertaining to the type of clause to be inserted in utility permits where states, counties, municipalities or other governmental agencies, as distinguished from investor-owned public utilities, were permittees [Clk. Tr. p. 168] [Copy of official certificate of the Secretary of Agriculture referred to in the transcript set out at length for better legibility as Appendix 2]. In these circulars the Chief of the United States Forest Service ruled:

> "It is beyond the authority of officials of states, counties, municipalities or other governmental agencies to accept a permit which so binds [with an obligation of unlimited liability] the political subdivision or agency they represent." (Bracket added).
>
> "You are authorized to substitute the following clause for standard clause 6 [now clause 8] in permits to states, counties, municipalities or other governmental agencies (Bracket added):
>
>> 'The permittee agrees to take all reasonable precaution to avoid damage to timber, young growth and watershed cover and diligently to undertake suppression action in the event of fire resulting from the exercise of the privileges herein granted.' "

The Forest Service said that the assumption of absolute liability was beyond the power of officers of states, counties and municipalities; yet, manifestly, under the Supreme Law of the Land Clause [U.S. Const. Art. VI], if the federal regulation imposing absolute liability was constitutional, it would not be beyond the power of state, county, municipal and other public officials to agree to obey the supreme law. Of course, the admission of the Forest Service that its requirements are unconstitutional does not necessarily make them so, but it does seem oddly provocative of thought upon the subject that the Forest Service itself, despite its claim that it had the power to impose absolute liability under federal statutes and the Federal Constitution and valid federal regultions, would at the same time think that public officials of the states, counties and cities could not agree to obey such a fiat. Thus, it is manifest that the Forest Service sought to treat investor-owned public utilities and public or consumer-owned public utilities, otherwise alike, differently.

B. The Concept of Equal Protection Is Applicable to the Federal Government.

The concept of appellant's constitutional argument is that the imposition of the burden of absolute liability upon investor-owned public utilities as a condition of the use of the national forest lands denies those utilities the equal protection of the laws when, in contrast, exactly similar entities, but for their ownership, conducting exactly similar activities, also on the national forest land, are free from such burden. This concept, traditionally thought of in terms of "equal protection" is formally equally a deprival of due process of law. In short, unequal protection is not due process. Thus, the federal government is equally inhibited, with the states, from such practice. There may have been some doubt of the application of the concept of equal protection to the federal government prior to the school desegregation cases. There can be none now.

In *Bolling v. Sharpe* (1953), 347 U.S. 497, 74 S. Ct. 693, Mr. Chief Justice Warren, speaking for a unanimous court, said:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal

> protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive . . . But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." [347 U.S. at 499].

After *Bolling,* the concept that "Fourteenth Amendment equal protection", at least in cases of substantial discrimination, was a part of the Fifth Amendment received increasing recognition in the various federal courts and by the judges and justices thereof.

In *Schneider v. Rusk* (1964), 377 U.S. 163, 84 S. Ct. 187, the Court said:

> "Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process' ". [377 U.S. at 168].

In Mr. Justice Black's dissent in *Griswold v. State of Conn.* (1965), 381 U.S. 479, 85 S. Ct. 1678, it is said that:

> "[*Bolling v. Sharpe*] merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law." [381 U.S. at 517, fn. 10].

In a number of District Court and Court of Appeals opinions the matter has become settled.

> *N.L.R.B. v. Gene Compton's Corp.* (9th Cir., 1959), 262 F. 2d 653, 636, Footnote 1;
>
> *Pacific Natural Gas Co. v. Federal Power Commission* (9th Cir., 1960), 276 F. 2d 350, 353;
>
> *Fulwood v. Clemmer* (D.C. Cir., 1961), 295 F. 2d 171, 174; There the Court said:
>
> "Though the equal protection clause of the Constitution applies in terms only to the states, 'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.' "
>
> *Howard v. U.S.* (9th Cir., 1967), 372 F. 2d 294, where the Court pointed out that '[t]he present concept of due process stems from our American ideal of fairness in treatment of all." [372 F. 2d at 301];
>
> *Kennedy v. Commandant* (10th Cir., 1967), 377 F. 2d 339, 344.

Perhaps the matter has been most absolutely stated by Chief Judge Campbell in the Northern District of Illinois:

> "Furthermore, the 5th Amendment's Due Processes Clause, notwithstanding some argument and suggestions to the contrary by counsel in the instant case, has now unequivocally been determined by the Supreme Court to either by inference adopt literally or at very least legally encompass the Equal Protection Clause of the 14th Amendment . . . to hold otherwise would of necessity imply an anomalous circumstance which would in effect per-

> mit the Federal Government (which would include the District of Columbia), to violate rights made sacrosanct from similar invasions by the states."
>
> *Todd v. Joint Apprenticeship Committee* (N.D. Ill., 1963), 223 Fed. Supp. 12, 19.

C. Application of the Equal Protection Concept of the Due Process of Land Clause to the Federal Government in Exercising Its Jurisdiction Over the Property Which It Holds as Outright Proprietor or as "Trustee for the People."

Appellee, of course, owns the national forest. The position of appellee is that this property is held "in trust for all the people." We think that there is a good deal of question as to whether a trust concept can properly be applied to the proprietorship which the Government has in national forest lands but we do not argue that it is not Government property. We think it is held by the appellee in the same way that the average individual owns his home. Whether it is thus held by the appellee or in some other philosophical concept, it is clear that ordinarily the cases have held that the United States has the same power with reference to the land which it owns as a private individual would have over his own land. The issue, however, in this case is not whether the United States has the power to grant or withhold from public utilities the right to transverse the forest land with electrical transmission or distribution lines. Rather, the issue is whether having decided to grant this privilege to various kinds of public utilities it must treat such grantees equally or at least treat them differently upon a rational basis and not simply upon arbitrary or capricious determinations. We believe that the cases are clear that the Government, in dealing with its own land and other like property, may not impose restrictions upon a use otherwise granted which are so discriminatory or otherwise unreasonable as to be basically unfair. If such an effort is made, it must be stricken down as lacking in due process. The point has not been dealt with profusely in the cases, as far as our research reveals. This is, perhaps, so because it is rare that the Government would try so to act. Certainly in the last decade, when concepts of fairness have so patently motivated almost every act of the federal government, and where civil rights have never been so much in the public mind, it is not surprising that discriminatory actions have been few, Thus, one would not expect many cases. Such cases as do exist, we submit, are manifestly clear.

The leading decision, and perhaps the clearest, is *Ivanhoe Irrigation District v. McCracken* (1958), 357 U.S. 275, 78 S. Ct. 1174. This is, of course, the famous "160 acre" decision and went to the Supreme Court upon certiorari to the Supreme Court of California. See *Ivanhoe Irr. Dist. v. All Parties* (1957), 47 Cal. 2d 597, 306 P. 2d 824; *Alboncio v. Madera Irr. Dist.* (1957), 47 Cal. 2d 695, 306 P. 2d 894; and *Santa Barbara Etc. Agency v. All Persons* (1957), 47 Cal. 2d 699, 306 P. 2d 875.

In *Ivanhoe,* the Court said, after deciding that, under the Constitution, Congress had the power to manage and dispose of federal property:

> "Also beyond challenge is the power of the Federal Government to impose *reasonable conditions* on the use of federal funds, federal property and federal privileges. (cases cited). The lesson of these cases is that the Federal Government may

> establish and impose *reasonable conditions* relevant to federal interest in the project and to the over-all objectives thereof." (emphasis added) [357 U.S. at 295].

After announcing these general principles, the Court then, by extensive consideration of the facts involved, determined that the discrimination there effected, whereby federal water could be used on 160 acre farms but not on larger farms, was reasonable and well founded in differences of fact. For example, the court found that one of the purposes of the law was to benefit the most people possible, not the most land possible, and that the limitation insures that the enormous expenditure of money needed to provide the water would not go in disproportionate share to a few individuals with large land holdings. The court further found that there was good reason for the discrimination in favor of the smaller plots in order to prevent the use of the Federal Reclamation Service for speculative purposes, but the court did not for a moment countenance the concept that the discrimination was lawful without even investigating the causes, reasons or need therefor; yet, that is exactly what the court has done in the instant case. By reason of the summary judgment appellant has been wholly precluded from showing at trial that there is not good reason why an investor-owned public utility should bear a heavier burden in exchange for the privilege of using a right-of-way for a transmission line than a consumer-owned, federally-financed public utility or a city-owned public utility should bear for the identical privilege.

Under the contract, as the Government has sought to interpret it and as the court has held proper and under the summary judgment where appellant has been precluded even from attempting to show the lack of good ground for such discrimination, two parallel elctrical lines in the same national forest, technically identical, owned in the one case by Southern California Edison Company and in the other by the Department of Water and Power, may exist only upon highly disporportionate expense levels. Although the fee charged for the use of the land is the same, although technically the lines are identical, although the hazard of fire, if any, from both lines is equivalent, although the rules of administration of the lines and the conditions of safety and the care applied to prevent accident vary not a whit, the appellant must, as a condition of having its line in such place, insure that it pay for any fire resulting from the electricity carried in its lines, but the Department of Water and Power need pay for the damage in the event of an identical fire and loss only if, in the first instance, it was negligent, and, in the second, if the Government was not guilty of contributory negligence, or not bound by any other insulating defense, such as assumption of risk. Surely, such a discrimination is not tolerable, at least in the absence of inquiry as to the reasons therefor. The affidavits of fact filed by appellant in this case went wholly undenied. Appellee did not even offer a conflicting affidavit of any kind nor an affidavit which in any way proved or offered to prove any ground for the discrimination, save only the rather gratuitious assertion that appellant was a profit-making company and the unsupported statement that it knew more about preventing fires than the United States Forest Service. It might have been thought that the most learned of all in this art were the national foresters and it seems unduly modest for them to claim such superior expertise on the part of appellant, especially in the absence of any verified statement whatever on the subject.

Ivanhoe, we think, settles the point that differences in the treatment of identical persons must be reasonable and upon challenge must be subject at least to proof on this score.

The most pertinent of all cases we have found, resting in an almost unbelievable colorful set of circumstances, might be entitled "The Perko Story" and to this series of cases we now turn. We suggest that to a large degree these cases are highly persuasive.

D. The Perko Story.

The application of the concept of equal protection and fairness, as required by the Fifth Amendment, to the federal government in its control and regulation of the public lands has not received extensive judicial consideration for the reasons aforesaid. Cases with respect to the National Forest Service are also rare and at the time of the argument below were apparently thought by both sides to be non-existent. At least we had not found the series of cases now adverted to and the federal government did not cite them. A very pertinent group of cases, however, does exist and, as above stated, they are, taken together, we submit, most persuasive. The same matter was before the courts on numerous occasions. For the case of convenience we are referring to these cases as "The Perko Cases."

In *United States v. Perko* (D.C. Minn. 1955), 133 F. Supp. 564, the subject matter was the use of a roadway across the Superior National Forest, a wilderness area in Minnesota. Perko and Zupancich had acquired fee title to certain real estate in an area which later became the so-called "roadless area" of the Superior National Forest. After acquiring this title they had improved the land with buildings and established hunting, fishing and recreational camps and resorts of considerable value. They had operated these resorts successfully for more than fifteen years. By executive order (Number 10092), by statute (the Shipstead-Nolan Act, 16 U.S.C. Section 577; the Thyl-Blatnik Act, 16 U.S.C. Section 577C), by various regulations of the Secretary of Agriculture and the National Forest Service founded upon the said statutes, executive orders, and even upon the Webster-Ashburton Treaty of August 9, 1842, directives had been issued which forbade the flying of aircraft across the area and ultimately prohibited Perko and Zupancich from using a logging road across the area. The matter came many times before the courts and the so-called "air ban" was upheld in *United States v. Perko* (D.C. Minn. 1952), 108 F. Supp. 315; affirmed, *Perko v. United States,* (8th Cir., 1953), 204 F. 2d 446; certiorari denied, 346 U.S. 832; 74 S. Ct. 48. Consistently, the doctrine supporting these decisions was the fact that the proper purpose of Congress was effectuated thereby, the purpose being to create and maintain in this portion of the national forest "the atmosphere of voyageur, Indian legends and the old canoe routes"—in other words, the maintenance of this wilderness area clear of any of the indicia and troubles of modern civilization.

Despite the consistent application of this policy to many would-be users of roads across the area, the National Forest Service, acting for the United States, for reasons not disclosed in the reported cases, granted to a private concern, the Northwest Paper Company, the right to maintain a private logging road for a distance of about four miles across the lands of the Government. The purpose of the road was solely to permit the paper company to remove timber which it controlled across the area. The road was closed by a gate and keys were provided only to the Northwest Paper Company and to Forest Service officers [133 F. Supp. 564 at 566-567]. After numerous attempts to get to their land with supplies and patrons had been frustrated, Perko and Zupanich sued the Northwest Paper Company and the Forest Service officer involved, in an effort to obtain by injunction the right to use the Northwest Paper Company road, which had been established under the permit above mentioned. Plaintiffs' motion for a temporary injunction was denied in that action [*Perko v. Northwest Paper Co.* (D.C. Minn. 1955), 133 F. Supp. 560]. Thereupon Perko and Zupancich cut the chains which barred the road and moved motor vehicles onto it for the purpose of permitting travel by station wagons and trucks. The United States then brought an action for an injunction prohibiting defendants from operating vehicles in the area and over the road in question.

After holding that the Forest Service was entitled to carry out the policy of maintaining the roadless wilderness area above described, the court said that this plan must be carried out without violation of the Constitution. The court said:

> "In carrying out said plan of management the plaintiff must not violate the Constitution and laws of the United States. The Constitution, of course, covers with the shield of its protection citizens of all classes, at all times and under all circumstances. [133 F. Supp. at 569].

While saying that pending litigation the defendants should not take the law into their own hands, the court also said that it

> "appreciates the frustration confronting defendants in the shutting off by lawful means of ingress and egress to their property by aircraft followed by their inability to travel to and from their properties over the canoe paths and portages which the Government challenges their right to use by motor vehicle transportation [133 F. Supp. at 569]."

And, further said:

> "True, other land owners in the Roadless Area have been using motor vehicles of one sort or another (some of which are capable of traveling over the lakes and streams) and which these defendants feel is an unjustified discrimination against them. This Court appreciates that efendants, under the circumstances, sense that they are being dealt with unjustly and in a manner foreign to American principles." [133 F. Supp. at 569].

The court held there was nothing unconstitutional in the general plan but cited with approval *City of St. Paul v. Dalsin, Minn.* (71 N.W. 2d 855), which said that an ordinance which was unreasonably oppressive and imposed restrictions upon one class of persons engaged in the particular business which are not imposed upon others engaged in the same business was a violation of the equal protection clause of the United States Constitution. After analyzing the fact situation in the then present case, the court further said:

> "Obviously, the Government's management plan should be administered as equally and uniformly as possible so as to avoid unjust discrimination." [133 F. Supp. at 570].

Pending the basic determination of the issue after full trial the court then resolved the immediate controversy by permitting the defendants to transport goods along the trails in the roadless area by packhorses, if necessary, but forbade the use of motor vehicles and heavy construction equipment and then suggested that perhaps

> "prior to the trial of the instant case on the merits some reasonable means may be arrived at in an attempt to solve the problem of the defendants so that equity will be served." [133 F. Supp. at 570].

The future course of the case turned out to be most interesting. In 1956 the matter came on for full trial, as is reported in *United States v. Perko* (D.C. Minn., 1967), 141 F. Supp. 372. By this time Perko, one of the parties, "made his peace with the Government, thereby eliminating himself from the instant case" [141 F. Supp. at 373] as suggested by the court in the case reported in 133 F. Supp. 564. As to Zupancich, the other defendant (one of whose employees was snowbound and marooned for five months as a result of the temporary injunction), the court apparently determined that he could not use motor vehicles and must be content with packhorses, despite the fact that he had been unable as yet to find satisfactory corrals or stables. The meaning of the ruling as to Zupancich is not entirely manifest from the opinion, although the court again noted with dissatisfaction that discrimination was continuing (141 F. Supp. at 374).

The denouncement came in *Bydlon v. United States* (1959), 175 F. Supp. 891. In this case Zupancich and others, contending that the effect of the statutes, regulations, decisions aforesaid had deprived them of property without due process of law, sought compensation for their losses in the Court of Claims. Zupancich was allowed $30,000. Certain of the judges wishes to make even wider awards, but this much was at least made certain—that either a working agreement was reached with the party so discriminated against as in the case of *Perko,* or proper compensation was made to equalize the burden, as in the case of *Zupancich.* Taking the litigation, then, as a whole, it establishes, we think, beyond question that the Government cannot in the administration of the national forest land discriminate among persons similarly situated in the use of the forest lands without balancing compensation and that in substance is exactly what has been done here. Without even the right to present evidence to show that there is no reasonable basis for treating publicly-owned or financed utilities differently than investor-owned ones and without even a suggestion that compensation be in some manner paid for imposing upon Edison a burden not imposed upon its counterparts, the court has, by extreme remedy, held that the evidence of discrimination was immaterial and irrelevant [Rep. Tr. p. 23] and has precipitately entered judgment upon the severest sort of absolute liability.

The concept of the *Perko* cases was adhered to in *Mackie v. United States* (D.C. Minn., 1961), 194 F. Supp. 306, although in that particular case the plaintiff was denied relief because on the facts he had another mode of access to his property which was not closed by the Government.

Conclusion.

For the above reasons, it is respectfully submitted that the judgment in the District Court be reversed.

Respectfully submitted,

Rollin E. Woodbury,
Richard T. Drukker,
Hugh B. Rotchford, and
Chase, Rotchford, Drukker & Bogust,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HUGH B. ROTCHFORD

United States Department of Agriculture
Forest Service

SPECIAL USE PERMIT

Act of June 4, 1897, or February 15, 1901
This permit is revocable and nontransferable

NAME OF PERMITTEE SOUTHERN CALIFOR EDISON COMPANY	KIND OF USE Minor Transmission Line
DATE OF PERMIT October 8, 1962	FILE CODE 2750 (5600)

REGION	STATE	FOREST	RANGER DISTRICT
5	California	San Bernardino	Cajon

Permission is hereby granted to SOUTHERN CALIFORNIA EDISON COMPANY

of P. O. Box 351, Los Angeles 53, California,

hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements: a right-of-way fifteen (15) feet in width on portions of government land within the following described Townships and Ranges:

T. 1 N., R. 3 W.,
T. 1 N., R. 4 W.,
T. 1 N., R. 5 W.,
T. 1 N., R. 6 W.,
T. 1 N., R. 7 W.,
T. 2 N., R. 4 W.,
T. 2 N., R. 5 W.,
T. 2 N., R. 6 W.,
T. 2 N., R. 7 W.,
T. 3 N., R. 5 W.,
T. 3 N., R. 6 W.,
T. 3 N., R. 7 W., SBBM

and as shown more particularly on maps on file in the Forest Supervisor's office and such extensions within the same area as are hereafter provided for.

This permit covers ________ acres and/or 8.82 miles and is issued for the purpose of:

constructing, maintaining and operating a general power distribution area

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of Forty-five and no/100 - - - Dollars ($ 45.00) for the period from January 1 19 62, to December 31, 19 62, and thereafter annually on January 1, at the rate of $5.00 per mile or fraction thereof., ________ Dollars ($ ________): *Provided, however,* Charges for this use may be made or readjusted whenever necessary to place the charges on a basis commensurate with the value of use authorized by this permit.

use shall be actually exercised at least 365 days each year, unless otherwise authorized in writing.

3. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; *provided* that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. ~~The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.~~ (See attached)

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

17. This permit is accepted subject to the conditions set forth above and to conditions 18 to 32 attached hereto and made a part of this permit.

DATE October 8, 1962	~~SIGNATURE OF ISSUING OFFICER~~ FOREST SUPERVISOR By D.M. Tucker	TITLE Acting Forest Supervisor

☆ U.S. GOVERNMENT PRINTING OFFICE : 1961—O-[illegible]

8. The permittee shall p[illegible] the United States for any damage resulting from this use.

18. Unless sooner terminated or revoked by the Regional Forester, this permit shall terminate and become void at the expiration of ten years from the date of issuanc but a new permit to occupy and use the same National Forest land may be granted provided the permittee will comply with the then existing laws and regulations governing the occupancy and use of National Forest lands of power purposes, and shall have notified the Regional Forester not less than two (2) years prior to said date that such permit is desired.

19. This permit confers no rights upon the permittee to use this right-of-way for purposes other than for the construction, maintenance and operation of a transmission line thereon.

20. Violation of any of the conditions of this permit shall be sufficient cause for its revocation; provided, however, that this permit will not be deemed to be terminated except upon formal revocation thereby by the Regional Forester, Forest Service, or his authorized representative, and not until the permittee shall have had a reasonable timd - not to exceed ninety (90) days - within which to show cause why such revocation should not be made.

21. The permittee shall allow, whwnever requested by the Forest Officers, a way across the land covered by this permit for the free ingress and egress of Forest Officers and for users of National Forest land and purchasers of National Forest products.

22. The permittee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties, and shall allow the Forest Service without charge, to construct, or permit to be constructed in, through and across the said project, railroads, chutes, roads, trails, conduits and other means of transportation not inconsistent with the enjoyment of said project by the permittee for the purpose herein set forth.

23. The permittee shall clear designated portions of the power line right-of-way, and keep them clear as required by the Forest Officer in charge; shall trim all branches of trees in contact or near contact with the line and on or adjacent to the right-of-way shall remove all dead snags and all trees leaning toward the line; and which are deemed hazardous or might fall in contact with the line; and shall observe such other precautions against fire as may be required by the Forest Officer in charge; all waste material shall be burned or otherwise disposed of to the satisfaction of the Forest Officer in charge. The clearing width shall be restricted to that necessary for safe transmission unless the specific permission of the Forest Supervisor for a greater clearing width is obtained.

24. The permittee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the Forest Service, or other agents of the United States to prevent and suppress fires on or near the lands to be occupied under this permit during the period of construction.

25. A fire prevention and control plan adequate in the judgment of the Forest Supervisor to the risks and hazards of this use shall be prepared and placed in effect by the permittee. This plan shall provide for necessary "standby" fire control equipment, and for the current disposal of trash.

26. The transmission line shall be designed and constructed in accordance with the accepted standards and specifications for transmission lines of similar voltages, capacity and purpose as set forth in the Rules and Regulations of the California Public Utilities Commission, its General Order No. 95 or subsequent orders it may issue before construction takes Place. The permittee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its power line and telegraph, telephone, signal or other power lines heretofore constructed and not owned by the permittee, and shall also place and maintain suitable structures and devised to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic or endangering life on highways and roads, in a manner satisfactory to the Forest Service.

27. The scenic and aesthetic values of the right-of-way and adjacent land shall be protected as far as possible consistent with the authorized use, during construction, operation and maintenance of the line.

28. The permittee shall make provision, or shall bear the reasonable cost (as determined by the Regional Forester) of making provision, for avoiding inductive interference between any project transmission line or other project work constructed, operated, or maintained under this permit and any radio installation, telephone line, or other communication facility installed or constructed before construction of such project transmission line or other project work, and owned, operated or used by the Forest Service in administering the National Forests and land under its jurisdiction. The foregoing provisions of this article shall also relate to any radio installation, telephone line, or other communication of facility installed or constructed by the United States after construction of such project transmission line or other project work. None of the provisions of this article are intended to relieve the permittee from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

29. That in respect to the regulation by any competent public authority of the service to be rendered by the permittee, or of the price to be charged therefor, and in respect to any purchase or taking over of the properties or business of the permittee, or any part thereof, by the United States or by any State within which such properties are situated or business carried on in whole or part, or by any municipal corporation of such State, no value whatsoever shall at any time be assigned to or claimed for the permit or for the occupancy or use of National Forest lands granted thereunder, nor shall the permit of such occupancy and use ever by estimated or considered as property upon which the permittee shall be entitled to earn or receive any return, income, price, or compensation whatsoever

30. Those sections of the right-of-way allowed by this permit which are withdrawn by the Secretary of the Interior under Section 24 of Federal Power Act and designated as a Power Site Withdrawal are subject to use at any time in connection with the development of water power. This permit, therefore, is issued with the specific understanding that it shall not interfere with such development, and may, if necessary, be terminated upon three (3) months notice that in the judgment of the Federal Power Commission the lands occupied are needed for use in connection with the generation of hydro-electric power or any other purpose contemplated by the Acts under with the lands have been withdrawn. It is further understood that the permittee assumes all risks in case it is used for power purposes, and that the permittee can look for no compensation in that event.

31. Extensions as necessary currently may be made to the li. authorized by this permit under the following conditions: (1) that the extensions are located within the boundaries of the distribution area which will be known as the Lytle Creek Distribution Area; (2) that before November 10 of each year, the permittee will report to the Forest Supervisor the actual mileage constructed to date and submit a map conforming to the requirements of the map forming a part of the application for original permit and showing any changes in location made during the year; (3) that the construction of any such expansion shall not be started until specifically approved in writing by the District Ranger and until conflicts in rights-of-way with other special uses hav e been settled; and (4) that power or lighting service to any cabin, house, or -other structur within the national forest boundaries will not be started until the wiring of such structures have been ppproved by the forest supervisor or his authorized representative.

32. This permit shall have no force and effect until the permittee has signified its acceptance of its provisions and conditions by signing below and returning all copies to the Forest Supervisor, 157 West Fifth Street, San Bernardino, California for final approval.

We have read the foregoing permit and agree to accept and abide by its terms and conditions.

SOUTHERN CALIFORNIA EDISON COMPANY

Date: OCT 12 '62

By
Title VICE-PRESIDENT

United States of America

DEPARTMENT OF AGRICULTURE
WASHINGTON

RECEIVED
July 12, 1967
U.S. Atty. - Lands Division,
Los Angeles, California

I, ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy ~~of~~ a document in my official custody as hereinafter described:

1. Forest Service Circular No. U-161 dated November 26, 1947.
2. Forest Service Circular No. U-202 dated March 11, 1949.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia,

this 23rd day of May, 1967.

Orville L. Freeman
Secretary

By Howard Campbell
Assistant General Counsel

(Signed pursuant to the authority of 25 F.R. 3336)

osc-74
8/66

A.

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

Address Reply to
CHIEF, FOREST SERVICE
and Refer to

WASHINGTON 25, D. C.

U
SUPERVISION
Policy
Uses

November 26, 1947

Circular No. U-161

Regional Foresters
and Director, Tropical Region

Dear Sir:

Standard clause 6 of our special use permit is in effect an unlimited liability clause since it binds the permittee to reimburse the Government for any damage to the United States as a result of the use of Government land by the permittee.

It is beyond the authority of officials of states, counties, municipalities or other governmental agencies to accept a permit which so binds the political subdivision or agency they represent.

You are authorized to substitute the following clause for standard clause 6 in permits to states, counties, municipalities or other governmental agencies:

> The permittee agrees to take all reasonable precaution to avoid damage to timber, young growth and watershed cover and diligently to undertake suppression action in the event of fire resulting from the exercise of the privileges herein granted.

Standard clause 6 should be retained in all other permits.

The Manual will be so amended at the first opportunity.

Very sincerely yours,

LYLE F. WATTS, Chief

By

2. Special uses which involve special hazards, usually including such uses as power lines, gas and oil pipe lines, railroads, smelters, or other hazardous uses, should include the following clause ("insurance clause"):

   B. 'Notwithstanding the provisions of other clauses of this permit requiring precautionary measures for the protection of the national forest, the permittee shall pay the United States for any damage resulting from this use, regardless of whether such damage is the result of negligence or of the violation of any of the provisions of this permit or of applicable regulation or law.

   This clause is substantially the same as the present clause 6 in its effect but has been reworded by the Solicitor in order to avoid possible legal difficulties arising from the addition of other clauses to the permit.

3. In permits to States, counties, municipalities, or other Government agencies, the following clause may be used. Note that this is a broadening of the clause authorized in Circular Letter U-161.

   C. The permittee agrees to take all reasonable precaution to avoid damage to property and resources of the United States, and diligently to undertake suppression action in the event of fire resulting from the exercise of the privileges herein granted.

4. It is the responsibility of the regional forester to see that the "insurance clause," B above, is used in cases where it is just and equitable that the United States be fully protected against special hazards.

5. In permits which include clause A or C above, additional damage clauses may be used to protect the United States against specific sources of damage inherent in the particular use authorized.

   Note: Special damage clauses are not necessary or desirable when clause B is used, since that clause protects the United States from any damage. With clause A or C it may often be desirable to cover special hazards - either by an additional damage clause or by additional stipulations in the permit which, if complied with, will prevent damage. See Manual instructions page NF-H5(7) relating to changing clauses in special use permits.

When Forms 832 and 854 are revised clause A will be made standard, since it is expected that it will be used in the great majority of cases.

The clauses A, B, and C are, of course, conflicting in the amount of liability placed on the permittee and should never be used in the same permit.

In accordance with the above policy, you are authorized to delete present clause 6 in the Special Use Permit, Form 832, and to substitute either clause A or C, in all future permits.

The substitution of clauses for old clause 6 in existing terminable permits presents a problem because the new clauses A and C are less protective and it might be argued that we are modifying a contract to the detriment of the United States. The new clauses should be substituted for clause 6 in the existing terminable, paid permits as of the next payment date and in existing free use permits on the next anniversary of the permit. This may be accomplished by a mimeographed notice, a sample of which is attached. Notices must be signed by a forest officer of equal or higher rank than the one issuing the permit. All notices must be signed; mimeographed signatures are not acceptable.

This procedure differs from the simpler procedure approved for grazing permits (See Circular Letter G-325), because all special use permits will not be amended in the same manner. It is therefore necessary that each amendment be specifically for a certain permit. Otherwise it might be possible for some permittee whose permit should contain clause B to claim that he had received notice that clause A was effective. Every effort was made to adopt the simpler procedure, but it could not safely be done.

If permittees ask about the effect of the change on them it should be pointed out that present clause 6 is an all-inclusive damage clause and subjects them to much more liability than either A or C.

Clause B is just as all-inclusive as old clause 6 and the additional wording is only for technical reasons.

Existing term permits, Form 854, cannot be revised until the term expires, or unless the permit is otherwise legally terminated.

When the present Forms 832 and 854 are revised to include clause A as the standard damage clause, you are authorized to delete it and to substitute clause B or C in accordance with the above policy.

You will be advised by separate letter with reference to the damage clause in grazing permits and application forms.

Very sincerely yours,

LYLE F. WATTS, Chief

By CM Granger

Attachment

(Designation)

Notice is hereby given that permission granted by the above-designated special use permit shall hereafter be subject to the condition that the following clause is hereby substituted for clause 6 of that permit:

> (Quote here clause A, B, or C of Circular Letter U-202, as the case may be.)

____
(Title)

____
(Date)

P.S.--Permittees desiring additional information about this substitution of clauses and the reasons therefor should write to the forest supervisor or the forest ranger.

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

Address Reply to
CHIEF, FOREST SERVICE
and Refer to

WASHINGTON 25, D. C.

U
SUPERVISION
Policy
Uses

March 11, 1949

Circular No. U-202

Regional Foresters
and Director, Tropical Region

Dear Sir:

Reference is made to Circular Letters U-191 and U-161.

The present clause 6, Special Use Permit, Form 832 reads:

> "The permittee shall pay the United States for any damage resulting from this use."

This is an unlimited liability clause, commonly called an "insurance clause." It protects the United States against all damage resulting from the use, including damage beyond the control of the permittee.

It does not seem necessary to use this clause in all special use permits. Hereafter, the policy set forth below will govern.

1. The following clause will replace the present clause 6 in the standard Special Use Permit, Form 832, and will also be used in the ordinary Term Permit, Form 854.

   A. The permittee will exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit and will pay the United States for any damage resulting from the violation of the terms of this permit or any law or regulation applicable to the national forests by the permittee, his agents, or employees, or through negligence of the permittee, his agents, or employees, when acting within the scope of their employment.

(Over)